Filed 9/26/16 P. v. Espinoza CA6

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ZEFERINO ESPINOZA, JR., Defendant and Appellant.	H039219 (Santa Clara County Super. Ct. No. CC954850)

This case returns to this court on remand after the Supreme Court's decision in *People v. Espinoza* (2016) 1 Cal.5th 61. In our prior opinion, we reversed Espinoza's conviction and vacated his sentence on procedural grounds. Because we vacated his sentence, we did not reach two remaining claims asserting sentencing error. The Supreme Court, however, reversed the judgment in our prior opinion on the procedural grounds and remanded the matter for us to consider the remaining claims. We do so now.

A jury found Espinoza guilty on six counts: Two counts of possession of a firearm by a felon; possession of morphine; possession of marijuana; possession of ammunition by a felon; and possession of diazepam without a prescription. The trial court sentenced Espinoza to an aggregate term of two years eight months.

Espinoza raises two claims of sentencing error. First, he contends his conviction for possession of less than 28.5 grams of marijuana must be retroactively reduced to an infraction based on a 2011 amendment to Health and Safety Code section 11357 (Section

11357). Second, he argues that the trial court erred by sentencing him to one year in county jail for possession of marijuana.

As to the first claim, we conclude the conviction under Section 11357 should be deemed an infraction. As to the second claim, we conclude the court did not impose a jail sentence on that count, but we will order the minutes corrected on remand to reflect the proper sentence.

I. FACTUAL AND PROCEDURAL BACKGROUND[1]

A. *Facts of the Offenses*

Espinoza lived with his roommate, Augustine Gonzales, Jr., and one other person in a four-bedroom house in San Jose. On September 3, 2009, Gonzales arrived home to find Espinoza had changed the lock on the front door. The new lock was poorly installed, and Gonzales was able to enter the house. Gonzales found Espinoza in the kitchen, and the two began arguing angrily. When Gonzales threatened to call the police, Espinoza threatened to kill him. Undeterred, Gonzales called the police to complain. He told the dispatcher that Espinoza possessed a firearm. On the dispatcher's instructions, Gonzales left the house while police were dispatched. Espinoza followed him out of the house and continued to make threats.

At trial, several police officers testified that upon their arrival they found both Espinoza and Gonzales in the street outside the house. The police handcuffed Espinoza and requested consent to search his bedroom. Espinoza consented to the search and told police which bedroom in the house was his. Espinoza also alerted them to the presence of a shotgun and a handgun in the house. In searching Espinoza's bedroom area, police found an unloaded 12-gauge shotgun in the closet, a loaded .25-caliber pistol under the mattress, a box of ammunition for a .38-caliber revolver, three containers of marijuana,

[1] The statement of facts and the procedural background are taken from our prior opinion.

and prescription medications including 11 morphine pills, 4 diazepam pills, and 28 lorazepam pills.

In a bifurcated portion of the trial, the prosecution presented evidence of Espinoza's prior felony convictions for false personation (Pen. Code, § 529)[2] and infliction of corporal injury resulting in a traumatic condition on a spouse or cohabitant (§ 273.5).

A. *Procedural Background*

In December 2009, the prosecution charged Espinoza by information with eight counts: Count One—possession of a firearm by a felon (former § 12021, subd. (a)(1), repealed and reenacted as § 29800, subd. (a)(1) [Stats. 2010, ch. 711, § 6]; Count Two—possession of morphine (Health & Saf. Code, § 11350, subd. (a)); Count Three—criminal threats (§ 422); Count Four—possession of less than 28.5 grams of marijuana (Health & Saf. Code, § 11357, subd. (b)); Count Five—possession of ammunition by a felon (former § 12316, subd. (b)(1), repealed and reenacted as § 30305, subd. (a)(1) [Stats. 2010, ch. 711, § 6]); Count Six—attempting to dissuade a witness by use or threat of force (§ 136.1, subd. (c)(1)); Count Seven—possession of a firearm by a felon (former § 12021, subd. (a)(1)); and Count Eight—possession of diazepam without a prescription (Health & Saf. Code, § 11375, subd. (b)(2)).

On April 30, 2012, the jury acquitted Espinoza on Counts Three and Six, but found him guilty on all other counts. The trial court sentenced Espinoza to an aggregate term of two years eight months as follows: two years on Count One; eight months on Count Two, consecutive to the two-year term on Count One; two years each on Counts Five and Seven, concurrent with the two-year term on Count One; and 365 days in county jail on Counts Four and Eight, concurrent with the two-year term.

[2] Subsequent undesignated statutory references are to the Penal Code.

II. DISCUSSION

A. *Reduction of the Conviction for Marijuana Possession to an Infraction*

In 2010, the Legislature enacted Senate Bill No. 1449, amending subdivision (b) of Section 11357 to reduce possession of less than 28.5 grams of marijuana from a misdemeanor to an infraction effective January 1, 2011. (Stats. 2010, ch. 708, § 1.) Based on this amendment, Espinoza contends his conviction on Count Four for possession of marijuana must be retroactively reduced from a misdemeanor to an infraction under the doctrine of *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*). The Attorney General contends *Estrada*'s retroactivity doctrine does not apply here because the amendment did not change the punishment for the violation—a fine of not more than $100 under both the old and the new versions of the statute.

In *Estrada*, the California Supreme Court held that new laws that reduce the punishment for a crime are presumptively to be applied to defendants whose judgments are not yet final. (*People v. Conley* (2016) 63 Cal.4th 646, 656 (*Conley*).) The court stated that the primary task is to ascertain whether the Legislature intended for the old version or the new version of the statute to apply. (*Ibid.*) "But in the absence of any textual indication of the Legislature's intent, we inferred that the Legislature must have intended for the new penalties, rather than the old, to apply. [Citation.] We reasoned that when the Legislature determines that a lesser punishment suffices for a criminal act, there is ordinarily no reason to continue imposing the more severe penalty, beyond simply ' "satisfy[ing] a desire for vengeance." ' " (*Ibid.*, quoting *Estrada*, *supra*, 63 Cal.2d at p. 745.)

Espinoza committed the instant offense in September 2009, and the prosecution charged him under the old version of the statute in December 2009. He was convicted in 2012 and sentenced in 2013, both after the amendment to Section 11357 took effect. Nonetheless, the record identifies his conviction as a misdemeanor. His case is not "final" for retroactivity purposes because it is still on appeal. (See *In re Pine* (1977)

66 Cal.App.3d 593, 594 [a judgment is not final until the time for petitioning for a writ of certiorari in the United States Supreme Court has passed].) Nothing in the text of Section 11357 or its amendments indicates whether the new version of the statute applies retroactively. Accordingly, Espinoza contends he is entitled to retroactive application of the new statute under *Estrada* because the reduction from a misdemeanor to an infraction constitutes a lesser punishment.

The Attorney General argues that the amendment did not result in a lesser punishment because the penalty remained unchanged. But as Espinoza notes, the California Supreme Court has stated in dicta that a reduction in classification from misdemeanor to infraction may constitute a reduction in punishment. (*In re Dennis B.* (1976) 18 Cal.3d 687, 695, fn. 4 [amendment to Vehicle Code statute reducing violation to an infraction meant defendant could not be punished as misdemeanant under *Estrada*].) The Attorney General also points to statements in the legislative history of Senate Bill No. 1449 indicating that at least one purpose of the amendment was to reduce the amount of resources spent on jury trials. That may be accurate, but *Estrada*'s presumption of legislative intent hinges on the text of the statute itself: "[I]n the absence of any *textual indication* of the Legislature's intent, we infer[] that the Legislature must have intended for the new penalties, rather than the old, to apply." (*Conley*, *supra*, 63 Cal.4th at p. 656, italics added.) Here, the text of the statute is silent as to its retroactive application, so *Estrada*'s presumption applies. Furthermore, the Attorney General's argument depends on an inference she draws from the legislative history; she points to nothing explicit in the legislative history stating whether the statute was intended to apply retroactively or not.

For the reasons above, we conclude Espinoza is entitled to retroactive application of the 2011 amendments to Section 11357. On remand, we will order the trial court to deem his conviction to be an infraction.

B. *Sentencing on Count Four*

Espinoza contends the trial court erred by sentencing him to one year in county jail on Count Four. He contends the sentence was unauthorized under Section 11357, which provided for a maximum penalty of a fine of not more than $100. He further argues that the time he spent in custody should be credited towards the fine. The Attorney General does not dispute that a one-year jail sentence would have been unauthorized, but she disputes Espinoza's assertion that the trial court actually imposed such a sentence on Count Four. She agrees, however, that the minutes should be corrected to reflect the proper sentence.

After pronouncing sentence on the felony convictions, the trial court turned to the two misdemeanor counts—Count Four (possession of less than 28.5 grams of marijuana under subdivision (b) of Section 11357) and Count Eight (possession of diazepam under subdivision (b)(2) of Health and Safety Code section 11375). The court stated, "For Count 4 and 8. [¶] One, probation is denied. [¶] Two, a county jail [sentence] is imposed of 365 days." The court ordered the sentence concurrent with the felony sentences. The minutes of the hearing indicated that the one-year sentence applied to each count.

" 'Rendition of judgment is an oral pronouncement.' " (*People v. Mesa* (1975) 14 Cal.3d 466, 471.) When there is a discrepancy between the oral pronouncement of judgment and the minute order, the oral pronouncement controls. (*People v. Zackery* (2007) 147 Cal.App.4th 380, 385.) Here, the most natural interpretation of the court's pronouncement is that the one-year sentence was the aggregate sentence for the misdemeanors combined, not a one-year sentence as to each count. And it is undisputed that a one-year sentence on Count Eight was authorized.

Accordingly, we conclude the trial court did not impose an unauthorized jail sentence on Count Four. On remand, however, we will order the minutes corrected to reflect the proper sentences.

III. DISPOSITION

The judgment as to Count Four is reversed, and the matter is remanded to the trial court. On remand, the court shall deem the conviction on Court Four to be an infraction, and the minutes of the January 1, 2013 hearing shall be modified accordingly. The minutes of the hearing shall also be modified to reflect that the sentence of 365 days in county jail was imposed only on Count Eight, and not on Count Four.

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WALSH, J.*

WE CONCUR:

_____
RUSHING, P.J.

_____
PREMO, J.

*Judge of the Santa Clara County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.